UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

NATIONAL DANCE INSTITUTE – NEW MEXICO, INC.

and **Case 28-CA-157050**

DIANA M. OROZCO-GARRETT, an Individual

NATIONAL DANCE INSTITUTE – NEW MEXICO'S ANSWER TO CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

COMES NOW National Dance Institute – New Mexico, Inc. ("NDI"), by and through its undersigned counsel, and submits this statement in opposition to the April 6, 2016 Charging Party's Exceptions to the Decision of the Administrative Law Judge ("Exceptions").

I. INTRODUCTION

On February 10, 2016, Administrative Law Judge Eleanor Laws ("ALJ") issued her decision in this case ("Decision"). The ALJ correctly concluded that NDI did not violate Section 8(a)(4) and (1) of the National Labor Relations Act ("Act") by failing to assign classes to the Charging Party ("CP") and by terminating her employment, did not promulgate, maintain, or enforce unlawful overly-broad work rules, and did not unlawfully threaten its employees with reprisal for engaging in protected Section 7 activity. *Decision* at 27: 23-33.[1]

In her Exceptions, the CP contends that the ALJ failed to properly analyze evidence in the case. Contrary to the CP's allegations, the ALJ analyzed the record evidence which clearly demonstrated that the CP engaged in a pattern of behavior that was inconsistent with NDI's mission and values and that such behavior was the basis for the termination of her employment. The record also shows that NDI's rules and policies are not overly-broad, and do not restrict an employee's Section 7 activity. The rules and policies provide guidance as to how employees are

[1] NDI uses the ALJ's same abbreviations. *Decision* 2:n. 2.

to conduct themselves and specifically state that protected activity, such as discussions and complaints about working conditions, are not prohibited. The record further shows that NDI did not threaten its employees with reprisal for engaging in Section 7 protected activity. Therefore, the National Labor Relations Board ("NLRB") should reject the Exceptions and uphold the Decision in its entirety.

II. ARGUMENT

A. The ALJ Properly Analyzed Evidence in the Wake of the CP's September 2014 Probation.

The CP claims that the ALJ failed to analyze NDI's placement of the CP on probation in September 2014 in the context of her employment, "the pattern of harassment" that followed, and her efforts "to protect herself from future retaliatory discipline." *Exceptions* 5. She further claims that her complaints were not substantiated by NDI and that NDI's placement of her on probation was "grossly unfair" and "hostile". *Id.* 6. These claims are without merit.

The CP's September 10, 2014 probation is not at issue in this case. That probation was the subject of the charge she filed with the NLRB on September 17, 2014 and the amended complaint issued by the Regional Director for Region 28 on March 10, 2015. As noted by the ALJ, that charge and complaint were settled when NDI agreed to pay the CP $213.00 backpay for auditions she was not allowed to attend, to revise its Standards of Professional Conduct policy, and to delete language in the September 10 probation letter that could be construed as prohibiting protected activity. *Decision* 4:1-16; *GC Exh. 34, 35, 36*; *Tr*. 219–221; *R Exh. FFF*. All other terms of the probation remained in effect. *Decision* 4:16-17; *Tr. 221-222, 601*. Thus, it was not necessary for the ALJ to analyze the CP's September 2014 probation and the investigation into her internal complaint[2] regarding her probation because those matters were

[2] Even if it were necessary, the internal investigation was proper and meaningful. *See Section II. E., infra.*

addressed as part of the CP's September 17, 2014 NLRB complaint. *DeSantiago v. Laborers Intern Union of N.Am., Local No. 1140*, 914 F.2d 125, 130 (8th Cir. 1990).

The CP also states that "[t]he ALJ falsely stated that [the CP] has been 'previously been' [sic] counseled about behavior similar to what is at issue" in this current case. *Exceptions* 7. This is incorrect. Indeed, the CP herself cites to Russell Baker's testimony and a NDI memo regarding her prior misconduct. *Id.* Respondent's Exhibit UU documented the need for the CP to correct her attitude and behavior toward others.. Nonetheless, that issue, too, was considered as part of the settled complaint. *DeSantiago, 914 F.2d 125, at 130.*

B. The ALJ Correctly Considered and Rejected the CP's "Proof" of Employer Animus.

The CP claims that the "most blatant proof of employer animus" is the statement that she was "not to discuss this matter with any NDI New Mexico or Santa Fe Public School Staff." *Exceptions* 7. Again, this statement was made in her September 2014 probation letter and was resolved by prior settlement. Accordingly, it is improper to raise it in this case. *DeSantiago,* 914 F.2d 125, at 130.

Even if it were proper to raise it now, the CP fails to explain how this statement shows animus toward her. This is because it does not show animus. It simply shows that once NDI was made aware that such language was prohibited by the NLRB, it removed it from the letter. *R. Exh. H, DD; Tr.* 219-221.

The CP also claims, without further explanation or support, that Liz Salganek's July 31 email to her referring to a section of the handbook that had been removed was proof of employer animus. *Id.* 8. The ALJ, in addressing the CP's averment, found the email in fact does not instruct the CP to "refrain from discussing work issues or protesting management's decisions" and therefore did not silence her, as the CP implies. *Decision* 21:36-38; *R. Exh. U.* It was simply

an attempt by Ms. Salganek to address Rachel Carpenter's complaint about the CP's misconduct and was an appropriate response to the CP's prior email. *Decision* 21:41-22:2, *R. Exh. U*. Moreover, assuming *arguendo* that it was evidence of animus, which it is not, based on the record, the ALJ found that NDI would have terminated the CP based on the complaints and investigations into her improper behavior. *Decision* 22:4-7; *R. Exh. A, U*.

The CP also claims that the failure of NDI to remove "language regarding being a 'good ambassador'" from a March 2010 memo is evidence of employer animus because the March 2015 Settlement Agreement prohibited it. *Exceptions* 8. The CP again misstates the record. The July 23, 2010 memo does not impose some overly broad or strict requirement on the CP to be a "good ambassador". Rather, the memo states that she should "embody the spirit of being an ambassador for NDI-NM both at the workplace and in the community", *R. Exh. UU*, which are principles inherent in NDI's mission and values[3]. This is consistent with NDI's mission and values, which require its employees to act as role models to students and in the presence of all constituents they serve. *Decision* 25:38-40; *R. Exh. U*. Any attempt by the CP to read it otherwise simply demonstrates her inability to comprehend and model these values and standards.

Additionally, the settlement of the 2014 NLRB charge did not require NDI to remove this language from the 2010 memo. *See R. Exh. G; Tr.* 219-221, 594, 601. NDI agreed not to use the Standards of Professional Policy against her, and it did not. However, NDI was not precluded from referring to or relying on her other work performance deficiencies outlined in that memo

[3] NDI does more than teach dance. As noted by the ALJ, "NDI strives to help children develop self-discipline, a standard of excellence, and a belief in themselves that will carry into all aspects of their lives. Students are taught to adhere to the 'core four': work hard, do your personal best, never give up, and choose a healthy lifestyle. NDI's tagline is 'teaching children excellence.' NDI"s core values are a belief in children, social responsibility, excellence, sustainability, and financial integrity." *Decision* :2:33-38 (citations omitted); *Tr.* 27:3-9, 203:19-204, 204:5-9; 203:15-204:4, 201:23-202:7, 201:14-22.

(such as the need to build positive collaborations, to increase communication, and to build positive working relationships with students, teachers and parents). *Id.; Tr.* 594, 601. Accordingly, NDI referred to and relied on the CP's past and continuing performance deficiencies and they remained in her September 10, 2014 probation letter. *See R. Exh. H* ("There have been additional incidents over the years that have been addressed verbally or in writing, yet the behavior persists."). Raising valid and documented failures by the CP to conduct herself in accordance with NDI's *bona fide* mission and values does not show animus, it simply shows that the CP acted contrary to NDI's mission and values.

The CP claims, too, that she was accused of misusing petty cash, but that "they backed down from this assertion." *Exceptions* 8. As before, the CP fails to explain how this shows employer animus toward her. What it does show is that NDI had grounds to believe the CP misused petty cash and when it notified her, she showed that she did not. There was no evidence that NDI did not have grounds for its belief.

C. The CP was Not Treated Disparately.

The CP claims that "the ALJ found that NDI treated another employee more favorably regarding similar infractions [but] failed to do sufficient analysis to justify her conclusion that [the CP] would have been discharged anyway." *Exceptions* 8. This claim is not correct.

The ALJ carefully considered the "infractions" to which the CP refers, both of which occurred during a year-end performance. The first involved the CP grabbing an educational assistant and a visually impaired student from Gonzales Elementary School ("GES"). *R. Exh. A.* The second involved another NDI employee, Gemtria St. Clair, lifting and moving a teacher from GES. *R. Exh. BB.* Ms. St. Clair self-reported the incident in which she was involved, was very apologetic and made suggestions on how to improve and avoid similar incidents. *Decision*

8:41-44; *Tr.* 107-108, 333-334, 408; *R. Exh. M*. Ms. St.Clair was issued a written reprimand. *Decision* 11:13-14; *Tr.* 188–189; *R. Exh. Y*. The CP, on the other hand, denied having hurt the educational assistant and the student. *GC Exh. 13.* These differences were among those considered and analyzed by the ALJ. Indeed, the ALJ specifically noted there were "meaningful distinctions between St. Clair and [the CP] justifying different responses." *Decision* 21:11-13.

The most significant distinction was that the only complaint against St. Clair concerned her contact with a teacher at NDI's year-end performance. *Decision* 21:13-14; *Tr.* 249-250. The CP, on the other hand, had two complaints against her – one from an educational assistant and one from a co-worker. *Tr.* 299, 327-328, 671-672, 689; *R. Exh. K, M, JJ*. Additionally, the CP had been placed on probation the year before because of her inappropriate conduct at Sweeney Elementary School. *Decision* 21:15-16; *R. Exh. H, EEE*. There was no evidence of any prior misconduct by Ms. St. Clair.

The CP also attacks Mr. Baker's credibility and his characterization of her responses to him when he was investigating the complaint against her and attempting to meet with her. *Exceptions* 8. She also claims that he lied about information in his possession. *Id*. at 9. The CP's attacks are unfounded. Mr. Baker was on the witness stand for one and one-half days, and the ALJ had ample opportunity to evaluate his credibility. *Tr.* 20-279. Indeed, the ALJ specifically stated that she reviewed and considered the "demeanor" and "apparent interests" of each witness, including those of Mr. Baker. *Decision* 14:25-26; *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). She also evaluated the various and different versions of events by considering "the inherent probabilities in light of other events[,] corroboration or the lack of it[,] consistencies or inconsistencies within the testimony of each witness and between witnesses with similar apparent interests." *Decision* 14:27-28. The ALJ also carefully considered, but discredited,

testimony or other evidence that contradicted her factual findings. *Decision* 14:29-30. Thus, while the CP believes that Mr. Baker was lying, just as she asserts that any statement that criticizes her behavior in any way shows *animus* toward her, as opposed to a deviation from reasonable NDI policies, the ALJ did not. The ALJ found Mr. Baker's[4] testimony to be "consistent" and stated "he did not strike me as disingenuous." *Decision* 19:n. 22. The ALJ was doing precisely what she was called to do – evaluate the credibility of the witnesses, finding Mr. Baker creditable. The CP is simply asserting the ALJ was wrong, which was not the case.

Simply put, there was overwhelming evidence in Mr. Baker's investigations into the complaints against the CP, which was presented at the hearing in this case, which proves that the two complaints against the CP – by the educational assistant and by the CP's co-worker, Rachel Carpenter – were well-founded. There was no evidence that NDI sought to shape or distort the investigation or that there was not genuine fact gathering performed. *Decision* 19: 27-29; *R. Exh. A, BB.* The two complaints concerning the CP's improper behavior toward the educational assistant and the student and the CP's use of profanity around children and parents at NDI were legitimate and sufficient grounds to terminate the CP. *Decision* 21:26-29.

In a desperate attempt to discredit the educational assistant's complaint, the CP claims that if NDI actually believed the complaint, "then it was under a duty to report this incident to a local law enforcement agency under New Mexico Statutes Annotated, NMSA, [sic] Sec. 32A-4-3. *Exceptions* 10. The CP's argument is, of course, procedurally barred and must be rejected because it has not been raised before[5]. *Local 594, United Automobile Workers v. NLRB,* 776 F.2d

[4] The ALJ also credited Ms. Carpenter's testimony over the CP's, *Decision* 21:4-5, and found Alison Montoya, who received school complaints against the CP, an "honest account". *Decision 20: n. 23.*

[5] Because this argument has not been raised before, there is no evidence in the record to show that NDI did or did not report the incident.

1310, 1314 (6th Cir. 1985) ("Since the Union failed to raise this issue in a timely fashion before the ALJ, we hold that it waived this defense.").

Finally, the CP claims, "The ALJ's conclusion that it was unreasonable to think NDI did not believe that [sic] allegations against the charging party because of an ongoing investigation is not reasonable." *Exceptions* 9. The CP's claim is not supported by the record. Based on the sufficient and substantial testimony and other evidence, the ALJ ruled against the CP's interpretation that the fact that the CP taught during the summer shows NDI knew the allegations that the CP had grabbed the educational assistant were false. *Decision* 19:14-16; *Tr.* 154. As the ALJ pointed out, Mr. Baker testified that when the decision to schedule the CP for the summer had been made, he did not have all the information regarding the allegations against the CP, and he thought the CP might provide an explanation if she met with him. *Decision* 19:16-19; *Tr.* 154, *R. Exh. A.* However, given the overwhelming evidence regarding the incident that was gathered through the investigation and his repeated but unsuccessful attempts to meet with the CP (who refused to meet with Mr. Baker about it), "any inference that Respondent knew it did not occur lacks support." *Decision* 19:19-22; *Tr.* 154. Again, substantial and creditable evidence supports the ALJ's decision. *Tr.* 154.

D. NDI did Not Produce Changing or Manufactured Evidence.

The CP claims that "the changing and manufactured evidence used by NDI to justify the termination is proof that improper motivation lay behind her discipline and termination." *Exceptions* 10. She claims also that the ALJ failed to analyze the interaction between Mr. Baker and the CP "in the context of the environment in which [the CP] was on probation and subject to further discipline and termination." *Id*. The CP claims that the ALJ considered these interactions in light of the complaints against her regarding the "injury allegation" and the "profanity

allegation" rather than in "light of retaliation". *Id.* While the CP would have the NLRB substitute the CP's view of the events rather than the reasoned consideration of the ALJ, as previously stated the substantial evidence presented clearly supports the ALJ's findings and conclusions.

The ALJ heard all the testimony and all the other evidence regarding the complaints lodged against the CP by the educational assistant. She considered "inherent probabilities in light of other events", "corroboration or the lack of it", and "inconsistent evidence" when evaluating the evidence and reaching her conclusions. *Decision* 14; *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). After doing so, she rejected the CP's assertions that Mr. Baker's investigations were anything but meaningful and appropriate, and that he attempted to trap the CP or shape or distort the investigations. *Decision* 19:24-29.

In fact, the ALJ specifically analyzed the interaction between Mr. Baker and the CP in the context of the CP's prior misbehavior and probation as well as in the context of her claims of retaliation. The ALJ stated, "The evidence shows that, in the wake of [the CP's] probation for her conduct toward the staff at Sweeney, the Respondent was faced with similar complaints about her." *Decision* 20:15-17; *Tr.*420: 1-13; 637-638; *R. Exhs. NN, OO, PP and EEE*. The ALJ describes the events that led to the CP's probation on September 10, 2014, *id.* 3-4, and then describes the CP's filing of a complaint with the NLRB seven days later on September 17, 2014, as well as the CP's alleged protected activity, *Decision* 3:29-5:12; 7:16-26, 30-31, 38-43. Based on consideration of all this evidence, the ALJ found that the CP's conduct was not protected activity. *Decision* 14:33-17:18; *R. Exh. U; NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *Medina General Operations v. NLRB*, 394 F.3d 207, 212 (4th Cir. 2005). The ALJ also found, based on all the record evidence and in light of the CP's claims, that NDI's failure to assign the CP to classes and termination of her employment were not retaliatory, but rather legitimate and

appropriate action. *Decision* 17:20-21:29. Substantial evidence clearly supports the ALJ's findings and conclusions.

Moreover, the CP's claims that the allegations regarding her use of profanity around children and parents were "constantly changing" in an effort "to create an actionable incident" and set up grounds for her termination "that did not exist originally" ignore the evidence presented at the hearing and are simply false. *Exceptions* 13. Confirming that a thorough investigation was conducted, the ALJ noted the various times Ms. Salganek and Mr. Baker each met with Ms. Carpenter and other witnesses to obtain written confirmation of the complaint and allegations. *Decision* 9:36-38; 10:9-10; 13:27-28; *Tr.* 257, 305, 310, 311; *R. Exh. BB, JJ, KK; GC Exh. 18*. The ALJ also specifically considered and found, "The evidence fails to show that [NDI] sought to shape or distort the investigation, or that there was not genuine fact gathering" with respect to either of the complaints against the CP. *Decision* 19:27-29. And as previously stated, p. 5 *infra*, the ALJ also found Mr. Baker's testimony consistent and genuine. *Decision* 19:29, n.22.

Additionally, while Ms. Carpenter's testimony may have been more detailed than in her written complaint, it was in no way inconsistent with the written complaint as the CP alleges. *Exceptions* 15. And while Ms. Salganek initially informed the CP that Ms. Carpenter had complained about the CP mocking Ms. Lowman, Ms. Carpenter also complained about the CP's "language in front of parents and students". *Tr.* 678-695; *R. Exh. U, JJ; GC Exh. 18.* Of course, no action was taken against the CP "until she was informed of these allegations and permitted an opportunity to respond." *Decision*. 19:38-20:2; *GC Exh. 27; R. Exh. A; Tr.*358, 416.

Furthermore, no factual basis exists to support the CP's claim that other NDI employees were not punished for using foul language. *Exceptions* at 15. NDI provided "unrefuted testimony

regarding other employees who were disciplined and/or terminated for conduct similar to [the CP's]." *Decision* 21:n.4; *Tr.* 699-703. The CP fails to cite any evidence or testimony other than her own unsupported conclusions to that effect.

E. NDI's Investigations were Meaningful and Appropriate.

The CP claims that none of NDI's investigations into complaints brought by her and against her were meaningful. *Exceptions* 15. Other than her personal interpretation of events, the CP ignores the record. She claims that Maria Wolfe, NDI's Business Manager, did not properly investigate the internal complaint she brought regarding her September 2014 probation, but instead "rubber stamped" the action. *Id.* Again, however, the only evidence presented in the record and considered by the ALJ on this point shows that the CP's arguments have no merit.

The CP has presented no evidence of rubber-stamping. The only evidence is that the CP brought an internal complaint of discrimination and that Ms. Wolfe investigated it and found no discrimination. *Tr.* 62. The CP filed similar complaints with the New Mexico Department of Workforce Solutions, Human Rights Bureau ("HRB") and the Equal Employment Opportunity Commission ("EEOC") alleging her probation was unlawful discrimination based on her national origin. *Decision 4 n.4; Tr.621-622; R Exh. VV.* The HRB and the EEOC also found there was no probable cause for the CP's complaint against NDI. *Tr. 621-622.* None of this evidence suggests that Ms. Wolfe simply "rubberstamped" the CP's probation.

With respect to Mr. Baker's investigation into the incident involving the educational assistant and the student, the CP claims that "although he spoke to the school employee, all the rest of his interviews were with NDI personnel" and that he failed to consider the alleged injury to her arm. *Exceptions* 15-16. This is not true. In addition to the educational assistant, Mr. Baker interviewed the school principal. *Decision* 8:30-31; *Tr.* 107, *R. Exh. A.*. He also had the minutes

of the wrap-up meeting at GES, at which other school administrators and staff expressed their concerns. The CP's criticism of Mr. Baker for not interviewing other witnesses is also questionable since she herself claims that there were only two eye witnesses to the incident – the CP and the educational assistant. *Exceptions* 17, *R. Exh. A*. The educational assistant agreed to and did in fact speak to Mr. Baker; the CP did not. *R. Exh. A.*

As for the "injury" to her own arm, the CP did not raise this to Mr. Baker until June 29, 2015, more than a month after the incident. *GC Exh. 14.* Nonetheless, Mr. Baker considered this explanation, along with the CP's other written responses to him, as part of his investigation, but nonetheless believed the educational assistant's version of the incident. The ALJ agreed with Mr. Baker. *Decision* 8:23-25; *R Exh. A, T; Tr.* 138;

The CP further claims that "the 'smoking gun' of a lack of meaningful investigation as an exercise of unlawful purpose is the report of the meetings held in July and August, 2015 among Salganek, Baker, Wolfe, and their attorney." *Exceptions* 16. She claims that "[t]he only rational inference" from these meetings is that they "were concocting a legal basis for termination." *Id.* This argument is wholly unsupported, except by the CP's imagination, and is ultimately ludicrous. That a party would meet with its attorney for advice and counsel is in no way considered "concocting" legal theories. Obviously, the CP is attempting to divert attention away from the clear and consistent testimony and evidence presented and heard by the ALJ that was the basis for the ALJ's decision – the CP was terminated for acting disrespectfully, unprofessionally, and inappropriately toward members of the NDI community, refusing to accept constructive criticism directed toward improvement of her performance or to take responsibility for her behavior, and showing she was unwilling to change her unacceptable and disruptive conduct. *GC Exh. 27*. Of course, given the CP's litigious nature and the numerous threats of

additional litigation she made to NDI, it is not surprising that NDI would have sought legal advice. NDI did not need to "concoct" a legal basis to terminate the CP's employment. Her pattern of behavior inconsistent with NDI's mission, values, and policies despite efforts to correct it and her actions in harming the educational assistant and alienating schools that NDI provided service to was the legal basis for her termination. *Decision* 21:16-18; *Tr.* 614:25-618:11, *R. Exh. A; GC Exh. 27.*

F. The CP's Complaints Criticizing Management were Not Concerted or Protected Activity.

The CP claims that the ALJ erred by focusing "upon 'artistic choices'" when analyzing the CP's complaints criticizing management. *Exceptions* 16. She claims that her complaint about Ms. Lowman changing a dance step and about Ms. Lowman's kitchen sink email were concerted and protected activity because they concerned management decisions that "affected all the teacher employees and their conditions of employment" and that the ALJ "sidetracked the legitimate complaint into the 'voo-doo doll' nonsense." *Id.* These claims are without merit because the record substantiates the ALJ's findings and conclusions.

The CP failed to provide evidence to show how her suggestions about the artistic direction of the year-end show, a highly subjective topic, would benefit her fellow employees. *Decision* 15:12-13. The CP also failed to show that her criticism of a dance step change or any of her other criticisms or suggestions were shared by other employees or that it would benefit them in any way. *Decision* 15:18-21. In fact, the ALJ also found that one of the CP's suggestions – that her students be given more stage time – would logically benefit the CP at the expense of her co-workers. *Id.* 15:n.19.

Similarly, no evidence was presented that anyone was offended by or "took umbrage" with Ms. Lowman's email regarding the kitchen sink. *Decision* 15:27-28. On the contrary, the

evidence showed that the employees to whom the CP spoke to about Ms. Lowman did not agree with her and did not want to discuss it with her. *Decision* 15:27-29; *Tr. 361:12-21; Tr.* 689:24-690:3; *R. Exh. U, BB, JJ, KK*. There was no evidence that the CP's choreography suggestions and comments about Ms. Lowman were geared toward group action. *Decision* 15:31-32. As the ALJ noted, the great weight of the evidence was consistent with a determination that the CP's comments mocked Ms. Lowman and were based on the CP's "personal animosity rather than an attempt to discuss working conditions." *Decision* 24:40-41; *R. Exh. U, BB, JJ, KK; GC Exh. 18*. Clearly, they were not concerted.

The CP's suggestions and comments also were not protected. They were not directed toward wages, hours and other working conditions, nor were they aimed at improving the interests of employees. *Decision* 16:7-9; *G&W Electric Specialty Co.*, 154 NLRB 1136, 1137 (1965). The complaints largely concerned the CP's personal belief that the year-end performance did not address the needs and desires of NDI's Hispanic constituents, which is not a protected activity. *R. Exh U, BB, JJ, KK; GC Exh 18; Decision* 16:11-14; *Waters of Orchard Park*, 341 NLRB 642 (2004) (healthcare workers' complaints about quality of patient care not protected activity because concern was with welfare of patients not their own working conditions).

The CP's complaints regarding classroom instruction for the year-end performance were also not protected activity. That instruction is NDI's own "product" and as such does not involve a working condition. Because the CP's suggestions were about the artistic aspects of the program, they were focused on NDI's product and this is not encompassed within the "mutual aid or protection clause." *Riverbay Corp.*, 341 NLRB 255, 257 (2004) and *Lutheran Soc. Serv. Of Minn.*, 250 NLRB 35, 41 (1980).

The CP's comments about Ms. Lowman's kitchen sink email are also not protected activity. The CP did not complain about Ms. Lowman's request that employees clean up after themselves, but rather made personal and disparaging jabs at Ms. Lowman because she characterized the sink as the dirtiest thing she had to clean up. *Tr.* 681-686, 680-690; *R. Exh. U, BB, JJ, KK; GC Exh. 18*. And because the CP's comments were not concerted or protected, Ms. Salganek's July 31 email could not and did not violate the Act.

The CP cites to *Circle K Corporation & Moneagle*, 305 NLRB 932, 933 (1986), to argue that recipients of complaints about management style do not have to agree with the complaint for the complaint to be considered concerted activity. *Exceptions* 17. The CP's reliance on this case is misplaced. As stated in the portion of *Circle K* cited by the CP, the employee in that case sent a letter that "solicited and invited the backing of the Respondent's employees for efforts to improve their wages, hours, and other terms and conditions of employment." *Id. quoting Circle K.* The NLRB in that case did not need to take a "large step" to find the activity concerted because the letter at issue in that case specifically sought backing from other employees. There is no evidence the CP was seeking such backing.

G. The ALJ Did Not Improperly Rely on Hearsay.

The CP claims there was no direct evidence presented that she injured the educational assistant and that NDI did not present any admissible evidence that she did. *Exceptions* 17. The CP also claims that the only admissible evidence is her "denial that the incident occurred, and [her] explanation of [her] physical impairment which prohibited [her] grabbing anyone."[6] *Id.* Again, the record clearly shows otherwise, through testimony and exhibits that were both

[6] The ALJ considered this evidence and found that it did not suggest that the CP could not have harmed the educational assistant.

admissible and directly related to the complaints against the CP. *R. Exh. A, I, J, K, M, N, O; Tr.* 300, 326-327, 711-715.

As the CP states, the ALJ determined the minutes of the GES wrap-up meeting "constitutes a record of a regularly-conducted business activity under Federal Rules of Evidence 803(6)." *Exceptions* 18. This determination was made after hearing arguments from the Counsel for the General Counsel and from NDI. *Tr.* 109-114. These minutes, like other exhibits proffered by each side, were admitted as exceptions to the hearsay rule and could be relied on by the ALJ to reach her conclusions. *E.g.,Tr.* 197-198, 223, 227, 233; 235; 258-261; 278; 326, 347-348; 360-361, 420-422; *R. Exh. A, I, K, M, O, BB, JJ, KK, MM, NN, OO.*

Further, contrary to the CP's claim, the ALJ did not make a "ruling that any hearsay would not be considered for the truth of the matter." *Exceptions* 18. The ALJ ruled, "I will not consider any hearsay statements for the truth of the matter asserted *unless* they are corroborated by other reliable evidence." *Tr.* 146:10-12, 420-421; *Decision* 20 n. 23. Overwhelming and independent evidence corroborating not only the educational assistant's allegations against the CP, but Ms. Carpenter's testimony and statements, as well, was presented and acted on by the ALJ. *Decision* 20: 26-29, 21:1-9; *R. Exh. A, BB.*.

Finally, the CP's argument that NDI was required to prove the incident involving the educational assistant and the incident involving Ms. Carpenter actually happened is incorrect. *Decision* 20:24-25. NDI was required to show that it had sufficient evidence and information to form a good-faith belief that the incidents (or either of them) happened as reported. *Fresno Bee*, 337 NLRB 1161, 1182 (2002). NDI made that showing through the compelling evidence that the allegations made by the educational assistant against the CP and the allegations made by Ms. Carpenter against the CP were true. The information gathered by Mr. Baker, including from his

interviews of numerous individuals and from the CP's written responses, were enough for NDI to believe the allegations against the CP. *Decision* 20: 26-29; *Tr.* 672-675; *R. Exh. A, M*. Further, notwithstanding the CP's unsupported and self-serving statements to the contrary, sufficient and substantial evidence from numerous sources fully support the truth of the educational assistant's and Ms. Carpenter's statements regarding the CP's misconduct and inappropriate behavior. *R. Exh. A, BB.*

H. NDI's Employee Conduct Policy is Not Overly Broad.

The CP claims that NDI did not eliminate offending language from its Employee Conduct policy and that Mr. Baker "deleted only some parts of the rule, but maintained and published virtually the same overly broad rule. She claims that promulgation of a new rule was beyond Mr. Baker's authority and that both Ms. Salganek and Mr. Baker "continued to cite to the banned standard" as a basis for disciplining her. *Exceptions* 18, 19. She also claims that NDI's Office and Personal Etiquette Policies are overly broad. *Id. 20.* Once again, the CP claims have no merit and not supported in the record, while the ALJ's Decision is supported thereby.

The record evidence shows that the NDI Board and its Executive Committee authorized Mr. Baker to settle the CP's earlier NLRB complaint, including rescinding the Standards of Professional Conduct policy and adopting the Employee Conduct policy. Pursuant to that authority, Mr. Baker promulgated the policy with revisions that were consistent with the Settlement Agreement. The Board then ratified the revised policy. *Tr.* 219:5-19, 220:3-12, 221:16, 707:20-708:24. Thus, the revised policy was consistent with the Settlement Agreement and was promulgated pursuant to appropriate authority.

Moreover, as the record shows, with the Office of General Counsel's approval, NDI rescinded the Standards of Professional Conduct policy and replaced it with the Employee

Conduct policy, which did not contain language that the Office of General Counsel found improper[7]. *Tr.* 16:18-25. Accordingly, the Employee Conduct Policy was neither "offending" nor overly broad, and it was appropriate for Mr. Baker and Ms. Salganek to cite to it. *Exceptions* 18-19.

Ms. Salganek inadvertently referred to the Standard of Professional Conduct Policy in her July 31, 2015 email to the CP. *R. Exh. U.* Ms. Salganek quoted the Employee Conduct policy but mistakenly called it the "Standards of Professional Conduct" policy. However, she did not attempt to enforce the former policy. *Id.*

The CP also takes issue with NDI's Office and Personal Etiquette Policy and with NDI's core values. *Exceptions* 20. These issues were not raised in either the CP's charge, amended charge, the complaint, or in the amended complaint. *See GC Exhs. 1(a), 1(c), 1(e), 1(h).* Nor were they raised during the hearing, all of which explains why the ALJ "did not make a specific finding" with respect to the Office and Personal Etiquette Policy and NDI's core values. *Id.* 21. Those arguments cannot be raised for the first time in post-hearing exceptions. *Trident Seafoods, Inc*. v. NLRB, 101 F.3d 111, 116; *Local 594, United Automobile Workers v. NLRB,* 776 F.2d 1310, 1314; *Union Electric Co.*, 196 NLRB 830, 837 n. 34 (1972).

Nonetheless, when given a reasonable reading, read in context (*i.e.*, limited to NDI's course of conducting business and to conduct that would interfere with NDI's legitimate business concerns "of providing dance instruction to a vulnerable population"), and not presuming improper interference with employee rights, the Office and Personal Etiquette Policy and NDI's core values are reasonable and not overly broad. *Copper River of Boiling Springs, LLC,* 360

[7] If the Employee Conduct policy did, in fact, contain language prohibited by the prior NLRB settlement, the CP could have and should have brought it to NDI's attention soon after it was issued. That is, NDI issued the policy on March 13, 2015 to all its employees, including the CP. *R Exh. F*. The fact that she did not belies her argument.

NLRB No. 60, slip op. at 1 (2014); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Firestone Tire & Rubber*, 238 NLRB 1323, 1324 (1978). Additionally, given the clear and conspicuously placed limiting language, no reasonable NDI employee would view it as restricting Section 7 activity.

I. NDI Met its Burden of Proof.

The CP claims that NDI did not meet its burden to show that it would have terminated her even in the absence of protected activity. *Exceptions* 21. As a basis for this claim, she points to "the falsity of the allegations, the grossly unfair method of NDI's 'change the facts and hide the facts' investigation, and the conspiracy of management and their attorney in July and August 2015 to come up with an actionable excuse for termination constitute the requisite proof that NDI has not met its burden that it would have fired her anyway." *Id.* Each of these points has been previously addressed herein and NDI has shown that the ALJ properly found that NDI proved by a preponderance of the evidence that it would have terminated the CP even if she had not filed charges, *Decision* 20:10-21:21; and that even if the CP's conduct could be viewed as protected concerted activity, NDI would have terminated her even if she had not engaged in it, *Decision* 21:25-22:7.

III. CONCLUSION

Almost all of the CP's arguments regarding those findings and conclusions amount to self-serving statements that the ALJ disagreed with after hearing extensive testimony and evidence. Substantial evidence was presented supporting the ALJ's findings and conclusions, and the ALJ was in the best position to weigh the exhibits and testimony of the witnesses. The ALJ acted properly and reached her findings and conclusions based on the record as required under the law.

For the reasons set forth above, NDI requests that the NLRB: 1) uphold the ALJ's decision that NDI's actions of failing to assign classes to the CP and terminating her employment did not violate Section 8(a)(4) and (1) of the Act, that NDI did not promulgate, maintain, or enforce unlawful overly-broad work rules, and that NDI did not unlawfully threaten its employees with reprisal for engaging in protected Section 7 activity; 2) dismiss the complaint; and 3) grant such other and further relief consistent with the foregoing that the NLRB deems fair, just and reasonable.

Dated: April 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "*Respondent National Dance Institute –New Mexico, Inc.'s Answer to Charging Party's Exceptions to the Decision of the Administrative Law Judge*" was served via electronic mail, to the following on this 20th day of April, 2016:

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